

1 PETER T. BARBUR (admitted *pro hac vice*)
2 DAMARIS HERNÁNDEZ (admitted *pro hac vice*)

3 CRAVATH, SWAINE & MOORE LLP

4 825 Eighth Avenue

5 New York, NY 10019

6 Telephone: (212) 474-1000

7 Fax: (212) 474-3700

8 pbarbur@cravath.com

9 dhernandez@cravath.com

10 Attorneys for Defendant American Express Company

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14

B & R SUPERMARKET, INC.; et al.,

15 Plaintiffs,

16 v.

17 VISA, INC.; et al.,

18 Defendants.

Case No. 3:16-cv-01150-WHA

DEFENDANT AMERICAN EXPRESS
COMPANY'S OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

DATE: May 11, 2017

TIME: 8:00 am

PLACE: Courtroom 8, 19th Floor

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Honorable William H. Alsup

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1. Whether Plaintiffs have met their burden of showing through evidentiary proof that the requirements of Rule 23 have been met.

For the purpose of efficiency, American Express incorporates by reference the arguments asserted in Defendants MasterCard, Visa, and Discover’s Opposition to Plaintiffs’ Motion for Class Certification, with the exception of Sections II.A, II.C, III.B, IV and V, which incorporation does not cause this brief to exceed the 25-page limit. In addition to those arguments, class certification also is inappropriate because Plaintiffs’ class definition includes American Express card accepting merchants (“Amex Merchants”) that must litigate these claims, if anywhere, in the United States District Court for the Southern District of New York. This Court has twice held that the claims against American Express in this litigation are covered by the forum-selection provision of American Express’s Card Acceptance Agreement (“CAA”). Plaintiffs cannot circumvent those provisions by certifying a single class against all Defendants that includes Amex Merchants, who are subject to the forum-selection provision of the CAA.

This Court severed “all claims” by B & R Supermarket¹ and Monsieur Marcel against American Express and transferred those claims to the Southern District of New York, pursuant to the forum-selection and arbitration provisions in the CAA. (Order Grant’g Mot. to Trans. 3, June 24, 2016, ECF No. 282 (“June Trans. Order”); Order Grant’g Unopposed Mot. to Trans., Nov. 9, 2016, ECF No. 358 (“Nov. Trans. Order”).) Fine Fare, which does not accept American Express cards, is not subject to the CAA. (*See* Am. Compl. ¶ 23, July 15, 2016, ECF No. 291 (“Am. Compl.”).) Nevertheless, Plaintiffs seek certification of a single class of

¹ B & R Supermarket and Grove Liquors operate under a single account with American Express (*see* Order Grant’g Mot. to Transfer 2, June 24, 2016, ECF No. 282), and are collectively referred to as “B & R Supermarket” or “B & R”.

1 merchants, regardless of the fact that many putative class members are subject to a forum-
2 selection and arbitration agreement with American Express. (*See* Pls.’ Notice of Mot. for Class
3 Cert., Mot. for Class Cert. and Mem. of P. & A. in Supp. 2, Mar. 10, 2017, ECF No. 425 (“Mot.
4 for Class Cert.”) (“Plaintiffs seek to certify a Class of: Merchants who have been unlawfully
5 subjected to the so-called Liability Shift for the assessment of MasterCard, Visa, Discover and/or
6 American Express payment card chargebacks.”).)

7 ARGUMENT

8 I. PLAINTIFFS’ PROPOSED CLASS IS OVERBROAD.

9 The class definition is overbroad and cannot be certified against American
10 Express because it captures claims that cannot be brought in this Court. *See, e.g., Nat’l Fed. of*
11 *the Blind v. Target Corp.*, No. C 06-01802, 2007 WL 1223755, at *3 (N.D. Cal. Apr. 25, 2007)
12 (“The inclusion of individuals [who are] . . . not entitled to relief would defeat class
13 certification . . .”). “[C]ourts consistently decline to certify class definitions that encompass
14 members who are not entitled to bring suit under the applicable substantive law.” *Booth v.*
15 *Appstack, Inc.*, No. C13-1533, 2015 WL 1466247, at *15 (W.D. Wash. Mar. 30, 2015).² This
16 Court has already held that B & R and Monsieur Marcel cannot pursue their claims against
17 American Express in this forum. (*See* June Trans. Order 3; Nov. Trans. Order.) Moreover, Fine
18 Fare cannot assert claims against American Express on behalf of putative class members subject
19 to the forum-selection and arbitration provisions in the CAA. (*Compare* Mot. for Class Cert. 2,
20 *with* American Express’s Mot. to Compel Arb. and Trans. Venue 2-5, Apr. 18, 2016, ECF No.
21 229.) *See Tan v. Grubhub, Inc.*, No. 15-cv-05128, 2016 WL 4721439, at *2-3 (N.D. Cal. July
22 19, 2016) (denying class certification because the named plaintiff was not subject to a class
23 action waiver that applied to many putative class members). Thus, Plaintiffs cannot certify a

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25 ² Although Plaintiffs argue that the Ninth Circuit recently did away with any “ascertainability”
26 requirement (Mot. for Class Cert. 13 n.6), the Court noted that overbreadth is a barrier to class
27 certification that can be treated as a predominance issue. *Briseno v. ConAgra Foods, Inc.*,
28 844 F.3d 1121, 1124 n.4 (9th Cir. 2017); *see also Rodman v. Safeway, Inc.*, No. 11-cv-3003,
2014 WL 988992, at *16 (N.D. Cal. Mar. 9, 2014) (stating that overbreadth is “encompassed
within the commonality, predominance and typicality factors already addressed”); *Nat’l Fed. of*
the Blind, 2007 WL 1223755, at *3-4 (holding that plaintiffs’ overbroad class definition could
not be certified and narrowing the class definition).

1 class to pursue claims against American Express that includes merchants that accept American
2 Express.³

3 Accordingly, this Court should either deny certification, *see, e.g., Booth*,
4 2015 WL 1466247, at *16-17 (declining to modify the overbroad class definition *sua sponte*), or
5 modify the class definition to create two classes: (1) a class of non-Amex Merchants bringing
6 claims against Visa, MasterCard, American Express and Discover, represented by Fine Fare, and
7 (2) a class of Amex Merchants bringing claims against Visa, MasterCard and Discover,
8 represented by B & R and Monsieur Marcel, *see, e.g., In re Wholesale Grocery Prods. Antitrust*
9 *Lit.*, No. 09-MD-2090, 2016 WL 4697338, at *14-15 (D. Minn. Sept. 9, 2016) (certifying
10 separate classes in a price fixing case in which some class members were required to arbitrate
11 claims against one defendant, and therefore had claims against only the other defendant).⁴

12 II. PLAINTIFFS' PROPOSED CALIFORNIA AND FLORIDA STATE LAW CLASSES
13 CANNOT BE CERTIFIED TO PURSUE CLAIMS AGAINST AMERICAN EXPRESS.

14 Likewise, the California and Florida state law classes cannot be certified against
15 American Express because the claims of the class representatives for those classes have been
16 transferred to the Southern District of New York. Fine Fare—the only named Plaintiff in this
17 case with claims against American Express—is a New York business that cannot assert
18 violations of California or Florida state law. (*See* Am. Compl. at ¶ 23; Order Den. Mot. for
19 Prelim. Inj. 3, Mar. 16, 2016, ECF No. 36 (“[A] Florida business is unlikely to have any claim
20 for relief under California’s Cartwright Act.”).) *See Mazza v. Am. Honda Motor Co.*, 666 F.3d
21 581, 594 (9th Cir. 2012) (“[E]ach class member’s consumer protection claim should be governed
22 by the consumer protection laws of the jurisdiction in which the transaction took place.”).
23 Because Fine Fare has no claims under California and Florida law, it does not “possess the same
24 interest and suffer the same injury” as the California and Florida merchants and fails the

25 ³ *See* Discovery Order 4, Jan. 19, 2017, ECF No. 384 (“[T]he American Express Merchants will
26 be seeking class certification before the New York court, not here.”).

27 ⁴ Plaintiffs’ class certification expert, Prof. Officer, testified during his deposition that he was not
28 aware of data that would allow him to identify only those Visa, MasterCard, and Discover
chargebacks that were incurred by merchants that do not accept American Express. (Officer Tr.
267:25-268:11, Ex. 2 to Decl. of Michelle Parikh, April 7, 2017.)

1 typicality requirement. *See* Fed. R. Civ. P. 23(a); *see also Gen. Tel. Co. of SW v. Falcon*, 457
2 U.S. 147, 156 (1982). Without class representatives with California and Florida state law claims
3 against American Express, the Court cannot certify subclasses to pursue those claims against
4 American Express. *See Falcon*, 457 U.S. at 156.

5 **CONCLUSION**

6 For the reasons stated herein and incorporated by reference, American Express
7 respectfully requests that this Court deny Plaintiffs' motion for class certification.

8
9 DATED: April 7, 2017

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11 CRAVATH, SWAINE & MOORE LLP

12 *s/ Peter T. Barbur*

13 _____
14 PETER T. BARBUR
15 DAMARIS HERNÁNDEZ

16 825 Eighth Avenue
17 New York, NY 10019
18 Telephone: (212) 474-1000
19 Fax: (212) 474-3700

20 *Attorneys for Defendant*
21 *American Express Company*
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ATTESTATION

I, Peter T. Barbur, am the ECF user whose ID and password are being used to file the above DEFENDANT AMERICAN EXPRESS COMPANY’S OPPOSITION TO PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each listed counsel above has concurred in this filing.

s/ Peter T. Barbur
